No. 45034-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF LAKEWOOD,

Respondent,

Vs.

ROBERT W. WILLIS,

Petitioner.

BRIEF OF RESPONDENT, CITY OF LAKEWOOD

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I. INTRODUCTION

In *City of Seattle v. Webster*, 115 Wn.2d 635, 802 P.2d 1333 (1990), the Washington Supreme Court held that municipalities may impose panhandling and solicitation regulations, provided that those regulations conform to the requirements of the First Amendment. This is in accord with the United States Supreme Court's observations that "[s]oliciting financial support is undoubtedly subject to reasonable regulation[.]" *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 632 (1980).

The City of Lakewood has two panhandling-related prohibitions within its municipal code. The first, codified at Lakewood Municipal Code (LMC) 9A.4.010, prohibits "aggressive begging." The second, LMC 9A.4.020A, prohibits begging in so-called "restricted areas."

Robert Willis was convicted for panhandling in a restricted area under LMC 9A.4.020A: an Interstate 5 ramp in Lakewood. For the first time on appeal, he challenges the constitutionality of this Code provision.

Since *Webster* was decided, although a few cases touch on panhandlers, no Washington case has revisited the parameters within which local regulations for panhandling and begging satisfy First Amendment scrutiny. However, the overwhelming body of case law from other jurisdictions amply supports the roadside panhandling regulations at

issue here. As such, Robert Willis' conviction for Begging in a Restricted Area should be affirmed.

II. CROSS-ASSIGNMENT OF ERROR & ISSUE RELATING THERETO

Assignment of Error No. 1: The Pierce County Superior Court erred by declining to determine that LMC 9A.4.020A was "content-neutral" under the First Amendment.

Issue Relating to Assignment of Error: In order to conduct a proper analysis of government regulation of public speech in a public forum, review of whether the regulation is "content neutral," is mandatory. The Superior Court failed to engage in this analysis. Had it done so, it would have concluded that LMC 9A.4.020A is indeed, "content neutral."

III. BACKGROUND

On August 18, 2011, Lakewood Police Officer Jeremy Vahle responded to a complaint concerning an individual aggressively begging and banging on a vehicle at the I-5 exit to Gravelly Lake Drive. (CP 56-57). Upon arrival, he saw Mr. Willis, who was on the northbound onramp of I-5 facing southbound towards traffic. (CP 56). He also saw Mr. Willis approach a vehicle on the ramp. (CP 57-58). Mr. Willis had a cardboard sign with him stating that he was disabled and needed help. (CP 58). The

defendant was, by bodily gestures, signs and other means asking for money. (CP 59).

Officer Vahle explained to Mr. Willis that it was illegal to beg for money in the City of Lakewood in the manner in which he was doing it.[1] As Officer Vahle related at trial, the location in question where the defendant was holding his cardboard sign was used to enter and exit Interstate 5. (CP 59).

During his case-in-chief, Mr. Willis testified. He acknowledged seeking work at the ramp but also stated that he was asked to leave the corner by two other panhandlers who "were going to panhandle on the corner." (CP 74).

Officer Valle cited Mr. Willis for Aggressive Begging. (CP 20, 59).[2] The City amended the charge to Begging in a Restricted Area, which is also a criminal offense under the Lakewood Municipal Code. (CP 16-17). LMC 9A.4.020A. A jury convicted Mr. Willis.

Mr. Willis appealed to the Pierce County Superior Court. For the first time on appeal, he challenged LMC 9A.4.020A on multiple

[1] Pretrial, Mr. Willis successfully moved in limine to prohibit any reference to any bad acts. (CP 39-42). In opposing the motion, as an offer of proof, the City indicated that Mr. Willis had been identified by Officer Valhe "as someone he's warned in the past not to solicit from vehicles in the roadway." (CP 40).

[2] Mr. Willis did not designate any municipal court's filings as part of the Clerks Papers. *See* CP 113-114. As such, these citations are to some of those materials which he attached to his RALJ brief. Nevertheless, had he requested that the municipal court's record which was filed with the superior court be, in turn, transmitted to this Court, the docket, citation and amended complaint would have been a part of the Clerks Papers.

constitutional grounds. The superior court affirmed his conviction, reasoning,

> … Mr. Willis' conviction should be affirmed because LMC 9A.4.020A passes constitutional muster. LMC 9A.4.020A does not violate any rights under the First Amendment because it is a reasonable time, place, and manner regulation. The restrictions ~~are content neutral,~~ are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Similarly, LMC 9A.4.020A does not violate the Fourteenth Amendment because its requirements are not neither vague nor (assuming a proper record could be made) because of his alleged poverty, thereby impairing his rights of Due Process and Equal Protection.

(CP 111-112; strikethrough in original)

Mr. Willis petitioned this Court for discretionary review, asserting that LMC 9A.4.020A violated the First and Fourteenth Amendments to the federal Constitution. The City opposed Mr. Willis' motion, but in the event that his motion was granted, the City sought cross-review of the superior court's determination not to address whether LMC 9A.4.020A is content neutral under the First Amendment.[3] This Court granted both parties' motions.

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[3] The superior court's written decision strikes out the language from the proposed order indicating that the Code is "content neutral," reflecting that it declined to so find. CP 111-112. However, its oral decision could be read to suggest otherwise. Verbatim Rept. of Proceedings 8-9. Because "[t]o the extent its oral rulings conflict with [the court's] written order, a written order controls over any apparent inconsistency with the court's earlier oral ruling," in an abundance of caution, the City has filed the cross-appeal and our discussion treats the superior court as failing to decide the issue. *State v. Skuza*, 156 Wn. App. 886, 898, 235 P.3d 842 (2010)(citations omitted)

IV. ARGUMENT

A. Standard of Review

In a constitutional challenge to a local ordinance, "[a] duly enacted ordinance is presumed constitutional, and the party challenging it must demonstrate that the ordinance is unconstitutional beyond a reasonable doubt." *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005). Appellate review is de novo. *Id.* A "heavy burden," is placed upon a challenger seeking to overcome this presumption. *Fed'n of Employees v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995). "Wherever possible, it is the duty of [the] court to construe a statute so as to uphold its constitutionality." *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985)(citation omitted).

B. LMC 9A.4.020A Does Not Violate the First Amendment.

The First Amendment to the federal constitution (applied to the states through the Fourteenth Amendment) provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

For the purposes of argument, two assumptions should be highlighted. The first is whether panhandling is entitled to First Amendment protection at all. Division I of this Court has noted, without extended analysis, that it "agree[d] that begging is protected speech[.]" *City of Seattle v. McConahy*, 86 Wn. App. 557, 568, 937 P.2d 1133

(1997). The City does not contest this assumption. The second assumption is that a freeway on/off ramp is a "public forum." This, in turn, impacts what level of scrutiny is applied to Lakewood's Code. For the first time, Mr. Willis dedicates appreciable briefing to make the case that a freeway interchange is a "public forum," entitled to heightened First Amendment protections. Should the issue be reached at all, freeway ramps are not "public forums," entitled to the sort of First Amendment protections sought by Mr. Willis.

Nevertheless, even taking these assumptions into account, the Code passes First Amendment scrutiny.

1. Mr. Willis Has Failed to Demonstrate that Freeway Ramps Constitute Public Forums Deserving of Heightened First Amendment Scrutiny.

For the first time before this Court, Mr. Willis expands upon his contention that Lakewood is regulating speech in a public forum. (Br. of Appellant at p. 6-8). Mr. Willis did not dedicate any meaningful constitutional analysis to this issue before the superior court. Indeed, before the superior court both parties dedicated scant briefing to the claim that freeway ramps were public forums under the First Amendment. Because Mr. Willis' briefing to this Court suggests that this assumption should be revisited, the City responds: freeway ramps are not public forums entitled to heightened protections under the First Amendment.

Whether the location is a "public forum," represents a "fork," in the analysis; "an analysis of the 'character of the property at issue' is the touchstone of a legal inquiry into the constitutional validity of a regulation that attempts to limit expressive activity." *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 350, 96 P.3d 979 (2004)(quoting, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983)). Under both the federal and state constitutions, "[s]peech in nonpublic forums may be restricted if 'the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" *Mighty Movers*, 152 Wn.2d at 351 (quoting, *Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989)(ellipsis removed)). On the other hand, "speech in a public forum ... is subject to restrictions on time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Mighty Movers*, 152 Wn.2d at 350 (citations omitted). If these assumptions are revisited, as Mr. Willis suggests, freeway ramps are not public forums deserving First Amendment protection.

Part of the inherent difficulty in addressing this claim is that Mr. Willis challenged the ordinance for the first time on review. Washington law recognizes that a defendant may properly raise a constitutional

challenge for the first time on appeal to challenge the statute under which they were convicted. *State v. Ruff*, 122 Wn.2d 731, 733 fn. 1, 861 P.2d 1063 (1993). But, this holding rests on Rules on Appeal (RAP) 2.5. However, the Rules on Appeal for Courts of Limited Jurisdiction (RALJ), unlike the RAP, do not currently explicitly provide for such a constitutional challenge for the first time on appeal.[4] Assuming that a constitutional challenge for the first time on appeal is appropriate, the nature of the challenge leads to the real problem with Mr. Willis' analysis: appellate courts do not find facts. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). And, because the challenge arises for the first time on appeal, there is no factual record developed by Mr. Willis to support many of his claims. Assuming, that these defects are not unto themselves fatal, a straightforward legal analysis demonstrates that freeway ramps, and those areas adjacent thereto are not traditional public forums.

"Generally, courts looking at the question of whether government owned property is a public forum have considered whether a 'principal

[4] RAP 2.5(a)(3) permits a challenge for the first time on appeal to a "manifest error affecting a constitutional right." Under *Ruff*, a constitutional challenge to a statue or code under which a defendant was convicted qualifies. But the RALJ currently lacks such a provision. However, in November 2013, the Supreme Court has published for comment a proposed amendment to RALJ 2.2 whose language would mirror RAP 2.5(a). Nevertheless, RAP 2.5 can be invoked even if the issue was not raised before an intermediate appellate court. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 30 fn. 6, 992 P.2d 496 (2000).

purpose' of the property is the free exchange of ideas, whether the property shares the characteristics of a traditional public forum, and the historical use of the property." *Sanders v. City of Seattle*, 160 Wn.2d 198, 211, 156 P.3d 874 (2007)(citations omitted). In Washington, as it relates to freeways, such as Interstate 5, those roads are regarded as "limited access highways." As their name suggests, these roads are "especially designed or designated for through traffic, and over, from, or to which owners or occupants of abutting land, or other persons, have no right or easement," excepting for a "limited right or easement of access, light, air, or view." RCW 47.52.010 (Emphasis added).

Washington appears to have adopted a test stated by the Ninth Circuit Court of Appeals in determining whether an area is a traditional public forum and examining three facts: (1) "the actual use and purposes of the property, particularly its status as a public thoroughfare and availability of free public access to the area;" (2) "the area's physical characteristics, including its location and the existence of clear boundaries;" and (3) the "traditional or historic use of both the property in question and other similar properties." *Sanders*, 160 Wn.2d at 213 (citing, *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1101 (9th Cir. 2003)). These factors are inherently fact-based. And, because this claim arises for

the first time on appeal, there are scant facts by which to conduct any real analysis.

Much of Mr. Willis' analysis assumes that he was situated on a sidewalk at the time of this incident, but there is no proof of this.[5] Even assuming a "sidewalk," for First Amendment purposes, "not all sidewalks are public forums." *Chad v. City of Fort Lauderdale*, 861 F. Supp. 1057, 1061 (S.D. Fla. 1994)(collecting cases). However, "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 US 788, 799 (1985). The issue is whether (at the risk of oversimplification) the property has "immemorially been held in trust for the use of the public and, time out of mind," and "used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939).

Given this, Mr. Willis has not satisfied his burden to demonstrate on this limited record that a freeway ramp constitutes a public forum. He cites no case which has held that such a location has been treated as a public forum. Rather, those courts that have looked at freeway-based First

[5] Officer Valhe's testimony reflects the location where he stopped was on the ramp and had no shoulder, but he activated his overhead lights to avoid being hit. (CP 56-57). He then observed Mr. Willis, walking from a road shoulder (which is unclear from the testimony where this was relative to Officer Valhe's stopped patrol car), across the fog line, into the lane of travel to another vehicle. (CP 56-57).

Amendment regulations have reached the opposite conclusion. Particularly noteworthy is observation, as stated by one federal court, in the context of a different freeway-based free speech challenge, about whether such locations are public forums,

> [The location] on the Interstate 5 freeway … is not as compatible with the nature of expressive activity expected at a traditional public or designated public forum, such as assembly, debating, and protesting, as would be, for instance, a public square or park, because [the location] is located on the shoulder of a major freeway with high-speed vehicular traffic.

San Diego Minutemen v. Cal. Bus., Transp. & Hous., 570 F. Supp. 2d 1229, 1250 (S.D. Cal. 2008)(citing, *Hopper v. City of Pasco*, 241 F.3d 1067, 1078 (9th Cir. 2001)).

In this vein, other freeway related locales have been deemed unworthy to be treated as a "public forums," justifying access under the First Amendment. *Jacobsen v. Bonine*, 123 F.3d 1272 (9th Cir. 1997)(rest areas); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir., 1991) (same).

Revising these assumptions made at the superior court level, a freeway ramp is not a "public forum." But even continuing to assume, without conceding that a freeway ramp is a "public forum," the balance of Mr. Willis' challenges do not trigger a First Amendment violation under a heightened analysis.

2. The Code is Content Neutral.

The Superior Court incorrectly declined to make a determination whether LMC 9A.4.020A is content neutral and proceeded to analyze the other aspects of Mr. Willis' challenges. Before reaching those other issues raised by Mr. Willis, it is first necessary to determine the issue raised by the City on its cross-appeal: whether LMC 9A.4.020A is content neutral.

The touchstone in determining whether a regulation is content neutral, "in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986); *Ward*, 491 U.S. at 791.

Lakewood's Code passes the *Ward* test on several fronts. First, Lakewood's Code is not a "regulation of speech." Rather it is a regulation of where some speech may occur. *See e.g., Hill v. Colorado*, 530 U.S. 703, 719 (2000). Second, as in *Hill*, there is absolutely no showing that it is adopted "because of disagreement with the message it conveys." 530 U.S. at 719. Finally, the City's interest in in ensuring safe vehicular

access to and from Interstate 5 is wholly unrelated to the content of any such speech. *Id.*, 530 U.S. at 719.

Lakewood's Code limits "begging," which is defined as "asking for money or goods as a charity, whether by words, bodily gestures, signs or other means." LMC 9A.4.020(E). This definition mirrors virtually word-for-word the definition of "begging," contained in a City of Seattle Ordinance which was at issue and withstood multiple forms of constitutional challenge. *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1451 (W.D. Wash. 1994), *aff'd on other grounds*, 78 F.3d 1425 (9th. Cir. 1996).[6]

As it specifically relates to solicitation-related regulations, the Ninth Circuit Court of Appeals has identified that solicitation-based bans can be content neutral, "[a]lthough courts have held that bans on the *act of solicitation* are content-neutral, we have not found any case holding that a regulation that separates out *words of solicitation* for differential treatment is content-neutral." *ACLU v. City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006) (Emphasis by the Court; citations omitted). Even then though, "bans on certain *manner* of expression or expressive *conduct* [are] content-neutral." *Id.*, 466 F.3d at 794 (Emphasis by the Court; Citations omitted).

[6] Although *Roulette* was appealed, the Ninth Circuit was not called upon to review this definition. 97 F.3d at 302 fn. 2.

Although the United States Supreme Court has not squarely confronted the issue, in a line of cases, it has suggested that solicitation-based restrictions are generally content-neutral. *See, United States v. Kokinda*, 497 U.S. 720, 736 (1990)(plurality)("It is the inherent nature of solicitation itself, a content-neutral ground, that the [Postal] Service justifiably relies upon when it concludes that solicitation is disruptive of its business."); 497 U.S. at 739 (Kennedy, J., concurring) ("The Postal Service regulation, narrow in its purpose, design, and effect, does not discriminate on the basis of content or viewpoint ..."); *see also*, *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 649 (1981). It has also recognized that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 706 (1992).

The foregoing is consistent with those other courts which have sought to interpret the Supreme Court's solicitation-related jurisprudence in the roadside solicitation context. In *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal. 4th 352, 93 Cal. Rptr. 2d 1, 993 P.2d 334 (2000), the California Supreme Court was confronted with a certified question from the Ninth Circuit Court of Appeals as to what was the proper standard under the California Constitution for analyzing the constitutionality of ordinances governing the public solicitation of funds,

i.e., in-person requests for the immediate donation or payment of money. It was faced with two competing views. The challengers of a Los Angeles Ordinance contended that such ordinances should be "content-based" and may be upheld only if the regulation satisfies the very stringent "strict scrutiny" standard. The municipalities maintained that the less stringent "intermediate scrutiny" standard applied, and thus a "time, place, and manner" analysis was appropriate. Surveying the United States Supreme Court's precedents in this regard, it concluded that

> [The] high court opinions establish that a restriction on solicitation for immediate donation or exchange of funds may be found to be content neutral for purposes of the First Amendment even if the measure regulates such solicitation while leaving other types of speech untouched, so long as the regulation predominantly is addressed to the inherently intrusive and potentially coercive nature of that *kind* of speech, and not to the content of the speech.

993 P.2d at 346 (Emphasis by the Court; citations omitted).

Going one step further to evaluate lower federal court decisions on this issue, the California Supreme Court surveyed those cases and was able to conclude that "[a]ll lower court decisions of which we are aware, applying the First Amendment in this context, similarly have held … that laws targeting solicitations but not other speech are nevertheless content neutral." *Id.* 993 P.2d at 346. It accordingly concluded that "banning all solicitation for immediate donations in certain captive audience areas, should be considered content neutral," under the California constitution.

993 P.2d at 350. That Court also added that the California constitution, like the constitutions of many other states (including Washington), provide greater protections than the federal constitution. 993 P.2d 341-342.

The New York high court has had the opportunity to specifically opine on a roadside panhandling regulations and has deemed such regulations to be content-neutral. *People v. Barton*, 8 N.Y.3d 70, 861 N.E.2d 75, 828 N.Y.S.2d 260 (N.Y. 2006). In *Barton*, the New York Court of Appeals was confronted with a First Amendment challenge to a City of Rochester municipal code which addressed panhandling. The Court highlighted two provisions of the Code. The first contained a prohibition that "[n]o person on a sidewalk or alongside a roadway shall solicit from any occupant of a motor vehicle that is on a street or other public place." *Id.*, 8 N.Y.3d at 73 (quoting, City of Rochester City Code 44-4). The second provision contained a definition of "solicit," as "the spoken, written, or printed word or such other acts or bodily gestures as are conducted in furtherance of the purposes of immediately obtaining money or any other thing of value." *Id.* 8 N.Y.3d at 73 (quoting, Rochester City Code § 44-4 [B]).

The defendant was charged for a violation of this Code when "he allegedly waded into traffic on a highway exit ramp … soliciting money from motorists." *Id.*, 8 N.Y.3d at 73. Challenging, as here, for the first

time on appeal, the applicable municipal code as not being content-neutral, including reaching into so-called "'passive' panhandling [which] target[s] motorists--specifically, someone standing mute on the sidewalk, facing traffic in the street and holding a sign requesting immediate money or food..." 8 N.Y.3d at 76; New York's high court rejected any such challenge, reasoning simply,

> The Council's reason for adopting section 44-4 (H)--to promote the free and safe flow of traffic--is the relevant consideration, and the ban covers all those asking motorists for immediate donations, regardless of their message. Section 44-4 (H) does not attempt to silence one particular message; it does not frown on any particular viewpoint. Nor is it important that section 44-4 (H) may not reach every speech-related side-of-the-road distraction or source of traffic disruption in downtown Rochester; i.e., that it has an incidental effect on some speakers or messages but not others.

Barton, 8 N.Y.3d at 77 (internal citation, quotation and parenthetical omitted).

Lakewood's Code provisions are not aimed at any message or idea communicated by the panhandler. It does not restrict the expression of any message, idea, or form of speech. It does not distinguish between "good" and "bad" solicitation, and it does not discriminate based on identity. Contrary to what Mr. Willis may claim, Lakewood does not prohibit one type of solicitation, while leaving the field open for others. (Appellant Br. at p. 11-12). As the definition used by Lakewood includes

seeking "money or goods as a charity," LMC 9A.4.020(E); to use Mr. Willis' examples, if members of the Girl Scouts, Hare Krishna or other charitable organizations seek to obtain contributions at the City's freeway ramps, under the same circumstances as he did, they too could be held liable under the Code. Those seeking contributions, whether they are panhandlers or members of charitable organizations, remain free to ask others for money, provided that they do so in an appropriate manner. In this vein, the focus is not on the type of speech, but rather the form of the speech. As one federal court recognized, this distinction reinforces the content-neutrality of the regulation,

> A "type of speech" has nothing to do with the content of the speech itself; rather, it is the form -- begging, solicitation -- through which the message is conveyed that is banned, and is banned in all cases regardless of what the purpose or message behind the begging or solicitation may be. This form is simply a way of communicating, and does not in of itself have content.

Chad, 66 F.Supp.2d at 1246.

What Lakewood's Code does do is to restrict *where* requests "for money or goods as a charity," may be sought. LMC 9A.4.020A. The City's Code is content-neutral. On this singular point, the superior court erred. It should have reached the issue. Once reached, Lakewood's Code is a content-neutral limitation compatible with the First Amendment.

3. The Code is a Reasonable Time, Place and Manner Restriction.

A local government may impose reasonable time, place and manner restrictions, without offending the First Amendment, upon the use of the public roadways. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). The government "also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks[.]" *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 768 (1994)(citation omitted); *see also*, *City of Seattle v. Larkin*, 10 Wn. App. 205, 209, 516 P.2d 1083 (1973). "[T]he exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it." *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 320-321 (1968). "[I]t is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business. Solicitation impedes the normal flow of traffic." *Kokinda*, 497 U.S. at 733-734 (plurality), *citation omitted.* Indeed, "[i]t requires neither towering intellect nor an expensive 'expert' study to conclude that mixing pedestrians and temporarily stopped motor vehicles in the same space at the same time is dangerous." *News & Sun-Sentinel*

Co. v. Cox, 702 F. Supp. 891, 900 (S.D. Fla. 1988) (internal citations and quotations omitted).

Those federal courts to have considered the issue have uniformly recognized that municipal prohibitions on roadside begging constitute valid time, place and manner regulations. *See e.g.*, *International Soc. for Krishna Consciousness, Inc. v. Baton Rouge*, 876 F.2d 494 (5th Cir., 1989); *Gresham v. Peterson*, 225 F.3d 899 (7th Cir., 2000); *Association of Community Organizations for Reform Now v. St. Louis County*, 930 F.2d 591 (8th Cir. 1991); *see also, Smith v. City of Fort Lauderdale*, 177 F.3d 954 (11th Cir. 1999) (ordinance prohibiting panhandling on five-mile strip of beach and two attendant sidewalks); *Acorn v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986), *overruled in part by Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir 2011).

It is likewise of no moment that there may be other statutes and codes available to remedy this behavior. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800.

Lakewood's Code is a valid time, place and manner restraint. It does not prohibit all begging or seeking of charitable solicitations. Rather, it reasonably limits the locations to where these activities may occur.

4. The City Leaves Open Ample Alternative Channels for Mr. Willis to Panhandle.

The final requirement of the first amendment test requires that a time, place, and manner restriction leave open ample alternative channels for communication. *Ward*, 491 U.S. at 791. Under the terms of chapter 9A.4 LMC, not all begging in the City of Lakewood is banned. Instead, the City has prohibited aggressive begging, and has removed from consideration those areas which it has classified as a "restrictive area." In doing so, the City leaves open ample alternative channels for begging.

Under the Code, the default is that non-aggressive begging is permissible in all areas of the City. *See e.g., City of Spokane v. Marr*, 129 Wn. App. 890, 894, 120 P.3d 652 (2005). However, begging may not occur within those enumerated locales set forth in LMC 9A.4.020A. "[O]n and off ramps leading to and from state intersections from any City roadway or overpass," such as the I-5 ramp where Mr. Willis was soliciting from a motorist when Officer Valle arrived on-scene is one of those locations. LMC 9A.4.020A(1). This locale is, in turn, defined as

that area, "commonly used to enter and exit public highways from any City roadway or overpass." LMC 9A.4.020(J).

Without a question, had the City banned begging citywide or imposed a total ban in significant areas, the City's Code would likely be deemed overbroad. *Gresham*, 225 F.3d at 907, *citations omitted*. This is not one of those cases.

Lakewood's Code leaves open begging in all manner of other public fora to reach Lakewood's populace. Mr. Willis may "ply [his] craft vocally or in any manner [he] deem fit (except for those involving conduct defined as aggressive) during all the daylight hours on all of the city's public streets," excepting at freeway ramps and the intersections of arterials. *Gresham*, 225 F.3d at 207; LMC 9A.4.020A. As in *Gresham*,

> He may hold up signs requesting money or engage in street performances, such as playing music, with an implicit appeal for support. Although perhaps not relevant to street beggars, the ordinance also permits telephone and door-to-door solicitation at night. Thus to the extent that "give me money" conveys an idea the expression of which is protected by the First Amendment, solicitors may express themselves vocally all day, and in writing, by telephone or by other non-vocal means all night.

225 F.3d at 207.

Furthermore, he may solicit in public places throughout the city, except those parts, identified as a prohibited area such those covered intersections, ATMs, disabled parking spaces and bus stops. *Id.*

The City's Code continues to permit solicitation activity within its boundaries, and has no effect on the quantity or content of that expression beyond regulating where such activities may occur. *Ward*, 491 U.S. at 802. Granted, the limitations may reduce Mr. Willis' potential audience, but as in *Ward*, this "is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." 491 U.S. at 802.

Because the City's Code provides ample alternative locations to engage in his panhandling activities, Mr. Willis' challenge to the Code fails.

C. LMC 9A.4.020A Does Not Violate the Fourteenth Amendment.

Having chosen to challenge Lakewood's Code for the first time on appeal, Mr. Willis has deprived himself and the City to develop a proper factual record in support of many of his claims which relate to alleged Fourteenth Amendment violations. For example, Mr. Willis claims that the City has enacted legislation that "specifically targets individuals that need help or money," (Appellant Br. at p. 21); suggesting that the City (and its employees) discriminate based on poverty. He also suggests that by virtue of an after-the-fact determination of indigency, he is a member of a class, ostensibly the impoverished. Id. at p. 21-22.

There is no factual support or record otherwise developed to support any of these contentions. In a Fourteenth Amendment challenge asserted for the first time of appeal, it was Mr. Willis' burden to develop the record. By raising these issues for the first time on appeal, around these alleged "facts," these issues cannot be meaningfully reviewed.

As the superior court recognized, even if such a record could be developed, the balance of his Fourteen Amendment claims fail.

1. Even if the Record Were Adequate, LMC 9A.4.020A is not Void for Vagueness.

"Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Lorang*, 140 Wn.2d at 30 (citations omitted). Mr. Willis' sole challenge is to the definition of the word "begging," as defined in LMC 9A.4.020(E). But this definition has withstood constitutional challenge before.

This definition mirrors the definition of "begging," contained in the City of Seattle Ordinance which was at issue in *Roulett,* and upheld against multiple forms of federal constitutional challenge. As noted by the

District Court, such ordinances are neither overbroad nor vague. 850 F.Supp at 1451-1453.

The Washington Supreme Court has found statutes to be unconstitutionally vague for failure to provide fair warning only in "exceptional cases," *City of Seattle v. Eze*, 111 Wn.2d 22, 28, 759 P.2d 366 (1988), such as when important statutory terms were extremely hazy and remained entirely undefined, *see State v. Williams*, 144 Wn.2d 197, 204-06, 26 P.3d 890 (2001) ("mental health"); *Lorang*, 140 Wn.2d at 30 ("legitimate communication"); *State v. Richmond*, 102 Wn.2d 242, 244, 683 P.2d, 1093 (1984) ("lawful excuse"); *City of Seattle v. Pullman*, 82 Wn.2d 794, 798, 514 P.2d 1049 (1973) ("loitering"), when prohibited conduct was defined by reference to an ever-changing federal publication not readily available to the public, *see State v. Dougall*, 89 Wn.2d 118, 121, 570 P.2d 135 (1977); or when an important term involved too many variables and its application would be uncertain in any given case, *City of Seattle v. Rice*, 93 Wn.2d 728, 731-32, 612 P.2d 792 (1980) ("lawful order"). In contrast, the court has not found any statutes to be unconstitutionally vague simply because of the presence of ambiguity and the need for statutory construction. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013).

Mr. Willis' challenge to the Code, hinges largely on what he claims is a vague definition of "begging," within the Code. A reading of the text indicates otherwise. LMC 9A.4.020A(E) defines "begging," simply as "asking for money or goods as a charity, whether by words, bodily gestures, signs or other means." Mr. Willis does not elaborate on what part of this definition is unclear. The Code does define the offense with sufficient definiteness for ordinary persons to understand what is prohibited. In that vein, the Code is not vague.

Moreover, contrary to Mr. Willis' suggestions, the Code does not vest officers with the discretion to apply a colloquial definition of the word "begging." It also, contrary to Mr. Willis' suggestion, does not preclude political speech, protesters or stranded motorists from exercising their speech rights. As in *Webster*, "[t]he ordinance does not prohibit innocent intentional acts which merely *consequentially* block traffic or cause others to take evasive action." 115 Wn.2d at 641-642 (emphasis by the Court).

The difficultly with trying to analogize solicitation with these other forms of conduct is, as described by the Supreme Court,

> Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to

> do so, reach for a wallet, search it for money, write a check, or produce a credit card.

Kokinda, 497 U.S. at 734 (citations omitted).

In this sense, solicitation is different than other forms of speech, such as leafleting. *Id.*, 497 U.S. at 734.

The definition contained within chapter 9A.4 LMC is sufficiently precise to withstand a vagueness challenge.

2. LMC 9A.4.020A Does Not Trigger an Equal Protection Violation Due to Alleged Poverty.

"The first step in equal protection analysis is to identify the [government's] classification of groups." *Country Classic Dairies, Inc. v. Montana, Dep't of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). Once the classification is established, it is necessary to identify a "similarly situated" class against which the challenger's class can be compared. *Freeman v. City of Santa Ana*, 68 F.2d 1180, 1187 (9th Cir. 1995). Mr. Willis does not get past this first step.

Mr. Willis attempts to couch his claims that the City is discriminating against the poor. To reach this conclusion, Mr. Willis takes a leap without factual support or a logical reference. Specifically, Mr. Willis makes the leap that the panhandlers are the indigent, and hence that indigency is the appropriate classification. Although *some* panhandlers may be poor, it does not follow that *all* panhandlers are poor. Incidentally,

one court has concluded that income from panhandling can be treated as earned income under the federal Social Security Act affecting certain benefits. *Barry v. Shalala*, 840 F. Supp. 29 (S.D.N.Y. 1993).

Although Mr. Willis cites no evidence in support of his contention, even assuming his premise was correct, he identifies no case which holds that the impoverished are a "class," for Fourteen Amendment purposes. This is likely so, because those challenges have not been successful and the cases are otherwise.

Almost a quarter-century ago, the Washington Supreme Court, in addressing Seattle's begging restrictions, observed:

> We have found no cases where the homeless have been judicially declared a protected class for purposes of Fourteenth Amendment analysis. While we recognize society's valid concern for the plight of the homeless, there is nothing in this record to support such a declaration in this case.

City of Seattle v. Webster, 115 Wn.2d at 647.

Those local ordinances which criminalize intentional obstruction of pedestrian or vehicular traffic do not violate equal protection guarantees because these ordinances apply equally to all persons, and that nothing in those ordinances refer to economic circumstances or residential status. *Roulette v. City of Seattle*, 850 F. Supp. at 1449-50 (discussing *Seattle v. Webster, supra*). Indeed, the Supreme Court "has never held that financial

need alone identifies a suspect class for purposes of equal protection analysis." *Maher v. Roe*, 432 U.S. 464, 471 (1977).

There is no equal protection violation with respect to chapter 9A.4 of the Lakewood Municipal Code.

CONCLUSION

Mr. Willis' entire claim rests on several erroneous premises, but one stands out. Contrary to his central argument, Lakewood has not "plac[ed] a ban on begging." (Appellant Br. at p. 22). What it has done is remove a handful of areas where solicitation-related activities must necessarily yield to more substantive public safety concerns. As Division I of this Court observed in an analogous challenge to a local ordinance on free speech grounds,

> While we decline to invalidate the ordinance in this case, we wish to make clear what we are not deciding. First, we express no opinion about whether the ordinance is or is not good social policy. We hold only that the ordinance is constitutionally-valid legislation. [The Ordinance] is quintessential legislative policy making, and we will not disturb the policy decisions made by legislative bodies unless they are unconstitutional or conflict with state law.

McConahy, 86 Wn. App. at 561.

Regardless of whether one believes that Lakewood's Code is good social policy, it does not run afoul of the Constitution and Mr. Willis identifies no conflict with any other law.

For the foregoing reasons, the City of Lakewood requests that this Court affirm the decision below and uphold Mr. Willis' conviction.

DATED: March 7, 2014.

By: _____
Matthew S. Kaser, WSBA #32239
Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on:

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The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

EXECUTED this 7th day of March, 2014 at Lakewood, Washington.

_____
Matthew S. Kaser

LAKEWOOD CITY ATTORNEY

March 07, 2014 - 1:43 PM

Transmittal Letter

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